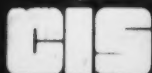


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NOMINATION—ICC

HEARING BEFORE THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

NOMINATIONS

FEBRUARY 6, 1990

EDWARD J. PHILBIN, TO BE A MEMBER, INTERSTATE COMMERCE
COMMISSION

Printed for the use of the
Committee on Commerce, Science, and Transportation



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(III)

NOMINATION—ICC

TUESDAY, FEBRUARY 6, 1990

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met, pursuant to notice, at 2:03 p.m. in room SR-253, Russell Senate Office Building, Hon. J. James Exon presiding. Staff members assigned to this hearing: Robert Holleyman, staff counsel and Ruth Johnson, minority professional staff member.

OPENING STATEMENT BY SENATOR EXON

Senator Exon. The committee will please come to order.

I would ask the Honorable Bill Lowery and Mr. Philbin to please take their chairs at the witness table, and we will proceed.

I would advise all that we have a vote scheduled for 2:15 p.m., and it may be necessary for us to interrupt the testimony today at some appropriate point so that we may go over and cast a vote about that time.

I certainly am pleased today to welcome Mr. Ed Philbin back to the Commerce Committee. Mr. Philbin has been here previously before the committee for confirmation as a member of the Federal Maritime Commission, a position he went on to hold with considerable distinction.

Today Mr. Philbin comes before us as a nominee to the Interstate Commerce Commission. Furthermore, President Bush has announced his intention to name Mr. Philbin to be the Chairman of the ICC if he is confirmed as a Commission member. This magnifies the level of public attention that will be given to the nominee's responses to questions today and the statement that I anticipate he will make.

In the eyes of this Senator and to a vast majority of my colleagues, the ICC serves a most important role. I am one who believes strongly that this role is best served by an independent commission such as the ICC. The last decade has been marked by rapid change in the transportation industry in response to partial deregulation brought about by the passage of the Motor Carrier and the Staggers Acts in 1980.

In many ways the ICC now has an even more critical mission, I suggest, than ever before. The ICC has the difficult task of balancing industry revenue needs with the needs of the shipping public for quality service at reasonable prices. Where the market cannot provide this, the Commission must step in. The fact that some have been reluctant to assume that responsibility has led to the problems that have arisen with regard to the Commission in the past.

All of the individuals who are present here today are quite familiar with the controversy that has been associated with the ICC in recent years. While I know that these problems will be discussed, I am hopeful that this hearing will lead us to an understanding of where Mr. Philbin would take the ICC in the future as its Chairman. I look forward to hearing from him in this regard after first recognizing other Members of the committee for any opening statements that they may have. Then we will call on introductory remarks by Congressman Lowery. Then we will go to the usual proposition of asking Mr. Philbin to proceed with his remarks.

I notice that we have been joined by another distinguished colleague, Senator Wilson of California. As is the usual custom, we will recognize him and then you, Mr. Lowery, or if either one of you are particularly pressed for time I would be glad to recognize you appropriately.

Mr. LOWERY. The House will again defer to the Senate.

Senator EXON. You are a diplomat already, I see.

Senator Rockefeller, any opening statement?

OPENING STATEMENT BY SENATOR ROCKEFELLER

Senator ROCKEFELLER. Just a brief one, Mr. Chairman.

I am very pleased to welcome Ed Philbin. As you know, I have been active on Interstate Commerce Commission matters. I have always felt that the Staggers Rail Act was a good act and that, in fact, if the Interstate Commerce Commission does what it was meant to do there would be no problems; in other words, competition where competition is needed and protection for shippers from monopoly power where that situation exists.

We have been through a period of years after enactment of the Staggers Act where the Interstate Commerce Commission was pretty much letting the good times roll for the railroads and not for those who had captive shipping problems. In my judgment, this pretty much rendered the Staggers Act a dead letter. It created such an impossible barrier for those who wanted to test rate reasonableness or bring complaints before the ICC that a lot of people gave up and there was a great deal of discouragement.

Although this subject is vastly hidden from public view, it happens to have a large impact on a lot of people from West Virginia, Kentucky and some other states, and I think the ICC has done considerable damage through inattention to the Staggers Act itself.

People, I guess, might be aware that I have sponsored the legislation in the last two Congresses, to ensure that the ICC carries out its responsibilities. I feel very strongly about that. It is a question of jobs and fairness involving the people in my state. When the people in my state are hurt or where jobs are threatened, I do not like it and I get angry.

The committee declined to accept the legislation which I submitted in 1988 by a one-vote margin. We then had a letter that was signed by 14 of the committee's 20 Members that went to the ICC which basically said please shape up or else we are going to come back with legislation. I happily report that since then there have been some positive signs, actions to correct the inflation index, for example.

In my judgment, Mr. Chairman, there is a lot more that needs to be done. For example, the Commission needs to develop a simplified rate reasonableness procedure for small shippers.

It needs to reconsider its use of product and geographic competition in deciding whether to hear rate cases.

It needs to be more responsive to affected communities on abandonment cases which are going to grow and increase all across the country.

It needs to complete the pending rulemaking on revenue adequacy and improve the accuracy of its revenue adequacy test, in my judgment.

It needs to be more vigilant in protecting rail-to-rail competition.

So, Mr. Chairman, the ICC is small. It administers a highly technical body of law. That highly technical body of law puts many people to sleep. On the other hand, if not properly done it puts many people out of work. Neither you nor I like that, and you have always said yourself that if the ICC Commissioners did their work, we had to do nothing with legislation. I tend to agree with you provided they do their work.

So here we are. We have a new potential commissioner before us, and I am looking forward to what he has to say.

Senator EXON. Thank you, Senator Rockefeller.

Senator Kasten?

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Thank you, Mr. Chairman, for holding this hearing on Edward Philbin's nomination to become Chairman of the Interstate Commerce Commission. I am pleased that we are now moving forward on a nomination that has been a matter of concern to both of us.

Edward Philbin is a nominee whose experiences uniquely qualify him to become an ICC Chairman. He has a strong legal background from his years as a law professor and the Assistant Dean of the University of San Diego Law School. He has served his country in the Air Force Reserve, as commander of the New Jersey Air National Guard, and as a Deputy Assistant Secretary of Defense. He also has been involved in transportation issues as a Commissioner at the Federal Maritime Commission. He understands Washington and the operation of independent commissions.

I hope that the Commerce Committee will move quickly to confirm Edward Philbin so that he can go to work to help the ICC tackle some of the tough issues that confront it. Again, thank you, Mr. Chairman.

Senator EXON. Thank you Senator Kasten.

Senator Burns?

OPENING STATEMENT BY SENATOR BURNS

Senator BURNS. Thank you Mr. Chairman, and I want to join you in welcoming Mr. Philbin.

Mr. Philbin and I met in my office in December to talk about the shortage of covered hopper cars in my State of Montana as well as other Western and Midwestern States. I was impressed, Mr. Phil-

bin, with your grasp of the issues on such short notice, and I look forward to working with you if you are confirmed.

Unfortunately, the hopper car situation in Montana is no better today than it was when we met in December. Recent headlines have read, "Rail crunch threatens local economy," "Grain car shortage stifles trade," and "Northeast grain elevator's future dubious." This illustrates the serious impact a situation like this can have on a state like Montana.

Burlington Northern railroad has been cooperative in helping me address specific constituent concerns. And I was pleased to hear recently that they have decided to purchase 1,000 additional hopper cars this year. However, we need to be looking at long-term solutions to the current hopper car situation.

This is a complicated problem for several reasons. The main one being that there are a number of interests concerned which traditionally have had a hard time finding common ground—these include railroads, shippers, grain elevators, and farmers. It is also complicated because building enough hopper cars to meet peak demands is like building a new church for Easter Sunday—you have one capacity crowd and then it sits empty the rest of the year. We have to work to find an equitable balance.

The ICC plays an important role in deciding cases which directly affect the covered hopper car supply. For example, there is currently a complaint filed at the ICC by the National Feed and Grain Association against Burlington Northern's advance car order program, the Certificate of Transportation or COT program. Several parties have intervened in the case on behalf of the Feed and Grain Association. These include the U.S. Department of Agriculture, Montana Public Service Commission, Montana Department of Commerce, Montana Citizens Freight Rate Association, Montana Women Involved in Farm Economics, Montana Grain Elevators Association, and similar organizations in North Dakota and Wyoming.

The BN has asked the ICC to waive that complaint. However, all the above mentioned parties think the case needs to be heard on its merits. I agree with that assessment, and hope that you will deny BN's dismissal request and hear the case. In fact, the Secretary of Agriculture stated in his response to BN's motion to waive that, "this proceeding involves issues which are of vital importance to the reliable and timely availability of railroad equipment at a reasonable cost which is vital in maintaining the competitive viability of U.S. agricultural shippers in domestic and export markets." The COT program should be reviewed on these grounds, and because of its effects on the small, captive shipper.

This is just one example of the important decisions you will be making, and on which I look forward to working with you.

I also hope that the ICC, under your guidance, will be able to take a more pro-active role, especially when it comes to issuing policies which will ensure that this country maintains its grain transportation infrastructure.

Thank you. Mr. Chairman.

Senator EXON. Thank you Senator Burns. I have a statement that the Chairman, Senator Hollings, would like to have included in the record.

The statement follows:

OPENING STATEMENT BY THE CHAIRMAN

Ed Philbin is before the Committee this afternoon as a nominee for the Interstate Commerce Commission (ICC). If confirmed as a Commissioner, the President has expressed his intent to designate Mr. Philbin to be Chairman of the Commission.

Mr. Philbin comes before the Committee with an impressive background. He has served as a Commissioner on the Federal Maritime Commission since 1984. Prior to that time, Mr. Philbin served within the Defense Department as Deputy Assistant Secretary for Reserve Affairs and was a professor and Assistant Dean of the University of San Diego Law School. Mr. Philbin also holds the rank of Major General in the Air National Guard of the United States.

The last few years have been difficult ones for the ICC and for those of us in Congress who have responsibility for overseeing transportation regulation and policy. Shipper complaints regarding the ICC's slowness to protect rail shippers led to a fierce legislative battle over whether or not to amend the Staggers Rail Act of 1980.

I resisted the call to amend the Staggers Act not because I agreed with all of the ICC's decisions, or because I endorsed the pace of the ICC's decision-making; but because, in my view, there is nothing inherently wrong in the Staggers Act that cannot be addressed by an ICC which fairly interprets the Act. That is why I take heart in Mr. Philbin's statement in which he expresses his intent to administer the laws that have been enacted by the Congress and, in general, not to make policy which should be the product of the legislative process.

I am aware, as is Mr. Philbin, that the intent of Congress in passing legislation is not always explicit and that Congress intended for the Commission to be vested with discretion in many cases. Nonetheless, an attitude, such as that expressed by Mr. Philbin, should do much to dispel the view that some Commissioners have in the past used the ICC as a forum to promote their own regulatory or deregulatory agendas. While I hope that Mr. Philbin, if confirmed, will not be timid in exercising his discretion to regulate—where Congress has provided for such discretion—I find encouraging Mr. Philbin's assurances that it is not his intention to administratively advance any regulatory restructuring in the absence of Congressional legislation.

Whether or not we proceed with further deregulation of the rail and trucking industries—and I, for one, would be opposed currently to further deregulation in either of these areas—is a decision for Congress to make. It is the ICC's role to regulate within the framework that Congress has established and where the market cannot be expected to provide adequate protection or ensure effective competition.

With this in mind, I look forward to Mr. Philbin's testimony and, if confirmed, his service on the ICC.

Senator EXON. Senator Wilson, unless you want to be more courteous than most Senators would be under the circumstances and yield to your colleague from the House of Representatives, I am happy to recognize you.

STATEMENT OF HON. PETE WILSON, U.S. SENATOR FROM CALIFORNIA

Senator WILSON. Mr. Chairman, I have no intention of disturbing the long tradition of discourtesy in the Senate.

But I do thank my distinguished colleague from the House. He is, as usual, not too diplomatic, but he is thoughtful and courteous. I will try to respond to his courtesy by not taking long because, frankly, no amount of time and no amount of words would really describe the pleasure that I have in introducing to you today the President's nominee for this very important role, the role that has been discussed and addressed by Senator Rockefeller in his opening statement.

The Honorable Edward J. Philbin is, I am proud to tell you, a long-time San Diegan. More to the point, he is a long-time public servant whose service has established very distinguished credentials. He has served as a Deputy Assistant Secretary of Defense. He

is presently a Federal Maritime Commissioner. He has been nominated by President Bush to be the Chairman of the Interstate Commerce Commission, and I think the President has exhibited very sound judgment in making a choice that will reflect credit upon him and, more important, one that will serve the Nation well in the functioning of a very important commission.

I quite agree with Senator Rockefeller. I have been privileged to know Ed Philbin for a number of years. I knew him first in his capacity as a professor of law at the University of San Diego Law School, then in his capacity as the Assistant Dean of that institution. I was very happy to find him here, having preceded me when I arrived in Washington.

When I came to the Senate in 1983 he was on duty at the Pentagon as the Deputy Assistant Secretary of Defense for Reserve Affairs. We worked closely during my tenure as the Chairman of the Manpower Subcommittee on Armed Services, the Chairman being a Member of that committee as well. He is very familiar with the importance of that effort and the very great importance of the kind of cooperation that we received in this case from the Deputy Assistant Secretary of Defense for Reserve Affairs.

In June of 1984 Ed moved to the Federal Maritime Commission. His performance there earned him yet another promotion and has won him kudos, I think quite deservedly, from both sides of the aisle.

I will not take long, and I will not go into great detail. I will simply say that in every job he has performed he has impressed those with whom he has worked and those who have worked for him with his ability to very clearly think through a problem and very concisely state an analysis of it, an analysis that in virtually every case led to curative action where that was required.

He has managed large organizations with limited resources. He has done so successfully, and his experience I think very clearly has prepared him for the important role that he would assume as the Chairman of the Interstate Commerce Commission.

It is with great pleasure, then, that as a former Member of this committee, which I remember fondly and which I would like to serve upon again, that I commend his nomination to you. I can only say that if I were a Member of the committee I would move the nomination. I do not have that privilege, but I am very grateful to you for having had the privilege to introduce him to you today. He is a very, very fine choice.

Senator EXON. Senator Wilson, thank you very much. We appreciate your comments.

We are now happy to turn to the Honorable Bill Lowery of the House of Representatives who I believe comes from the same San Diego area as the nominee.

We are very pleased that you came over, Mr. Lowery. Please proceed with any statement that you have at this time.

STATEMENT OF HON. BILL LOWERY, U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. LOWERY. Thank you, Mr. Chairman and Senator Rockefeller. I appreciate this opportunity to introduce a friend of mine. It is difficult to know just how to classify Ed Philbin in an introduction.

His career is varied and distinguished; his titles are many. We could talk about Major General Ed Philbin, Commander of the New Jersey Air National Guard, former active duty Air Force bombardier and navigator, or we could talk about Seaman Recruit Ed Philbin who enlisted in 1949, but that probably would not explain the high point of his military career when in 1981 the Senate confirmed him as Deputy Assistant Secretary of Defense for Reserve Affairs.

I could tell you about the Ed Philbin who received his engineering degree from San Diego State University and went to work for industry in the fields of aircraft and space systems design and weapons research. The young engineer wrote articles in 1961 with titles like, "A Blast Resistant Family Fallout Shelter with Protection for Automobile", and in 1968, "Evaluation of the Effects of Space Environment Exposure on the Index of Refraction and Extinction Coefficient of Apollo Window Materials". That was another lifetime.

Ed went on to receive his law degree and to practice and to teach law. It was at the University of San Diego School of Law that our paths first crossed. Ed was a fellow professor with my father-in-law. At one point he was assistant dean of the University of San Diego School of Law, and most recently the man before you was Commissioner of the Federal Maritime Commission again through confirmation of the United States Senate.

Ed is an amazing amalgam of education and expertise, all of which contribute to his qualifications for this post. He is also a respected friend and former constituent. This will be his third Senate confirmation, and it gives me great pleasure to recommend him to you without reservation to be Chairman of the Interstate Commerce Commission.

Senator EXON. Congressman, thank you very much. We appreciate your coming over.

You both can stay as long as you wish, or if you have other duties we do understand. There is a lot going on in both the House and the Senate these days.

Mr. LOWERY. We are about to have a vote on the House floor as well, Mr. Chairman.

Senator EXON. Thank you.

Mr. Philbin, we welcome you here today. We know you, and we know your background. Thanks for seeing some of us leading up to your confirmation hearing today.

At this time I would very much appreciate your making any statement that you care to make. I would like to move that without objection your full statement will be entered into the record, and if you wish to read it in full we certainly would be prepared to hear that or any summary remarks that you would care to make in that regard at this time.

[The biographical sketch and prehearing questions and answers follow:]

ERNEST F. HOLLINGS, SOUTH CAROLINA, CHAIRMAN
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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

(If more space is needed, please use attached REMARKS sheet)

A. BIOGRAPHICAL DATA

1. Name: PHILBIN EDWARD JAMES
 (Last) (First) (Other)
 Address: 607 S. 23rd Street Federal Maritime Commission
 (Current residence) (Business)
Arlington, VA 22202 1100 L Street, NW
Washington, DC 20573
 2. Position to which nominated: Chairman, Interstate Commerce Commission Date of nomination: November 9, 1989
 3. Date of birth: August 7, 1932 Place of birth: New York City, NY
 (month) (day) (year)
 4. Marital status: Married Full name of Spouse: Vivian Adele Philbin
(nee Camberg)
 5. Names and ages of children: Matthew Brendan Philbin - 15 months

6. Education:	Institution	Dates attended	Degrees received	Dates of degrees
	San Diego State College	9/52-6/57	BS Engr. (Mech.)	6/57
	University of California	1959-1962	None	
	University of San Diego Law School	9/62-6/65	JD Summa Cum Laude	6/65
	Air War College	8/77-6/78	Distinguished Graduate	6/78

7. Employment record. List all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

From	To	Name of employer	Address	Type of work
11/84 - Present		Federal Maritime Commission	1100 L St, NW Washington, DC	Commissioner
6/84 - 11/84		Federal Maritime Commission	1100 L St, NW Washington, DC	Consultant to Chairman
6/81 - 6/84		Department of Defense	The Pentagon	Deputy Asst. Sec. of Defense/Reserve Affairs
8/73 - 6/85		University of San Diego Law School	Alcala Park San Diego, CA 92110	Tenured Professor of Law (N.B. on Govt. leave 6/81-6/85; on military leave 6/77-6/79; Assistant Dean 8/71-8/ Assoc. Prof 6/70-12/72)

(continued)

8. Government experience. List any experience in or direct association with Federal, State, or local governments including any advisory, consultative, honorary or other part-time service or positions.

Commissioner, Federal Maritime Commission 11/84-Present (Acting Chairman 1/88-5/88)
 Consultant to Chairman, Federal Maritime Commission 6/84-11/84
 Deputy Assistant Secretary of Defense/Reserve Affairs 6/81-6/84
 Major General, Air National Guard of the U.S.; Commander, New Jersey Air National Guard, 2/88 - Present
 Brigadier General, Air National Guard of the U.S.; Deputy Commanding General/Air District of Columbia National Guard, 7/85 - 2/88
 Lt. Col., U.S. Air Force Reserve, Air War College (Student 8/77 - 5/78;
 Visiting Professor International Law 5/78 - 8/79)
 U.S. Air Force Reserve, various command and staff positions in AF Intelligence through the rank of Colonel, 11/64 - 7/85
 Lieutenant, U.S. Air Force Reserve, Navigator (continued)
 12/59 - 11/64)

9. Political affiliations activities: List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last 10 years.

Bush-Quayle Campaign, 1989, Researcher and Writer

Registered Republican since 1953

Legal Advisor to San Diego Republican Women's Club, 1979 - 1981

Contributions: Bush-Quayle Campaign - \$1,000, 1987
Senator Laxalt Committee - \$1,000, 1987

Bush-Quayle Media Dinner - \$500, 1988

Friends of Congressman Bill Lowery - \$300, 1988

Routine yearly contributions to California Republican Party averaging less than \$100.

- 10 Memberships List all memberships and offices held in professional, fraternal, scholarly, civic, charitable, and other organizations.

California Bar Association

San Diego Bar Association

San Diego Aerospace Museum, Trustee, 68-69

Oceotl Honorary Fraternity, San Diego State College

Blue Key Honorary Fraternity, San Diego State College

Phi Alpha Delta Legal Fraternity, Faculty Advisor, 71-75

Air Force Association, San Diego Chapter, President, 68-70

Arnold Air Society, San Diego State College (continued)

- 11 Honors and awards List all scholarships, fellowships, honorary degrees, honorary society memberships, and any other special recognitions for outstanding service or achievement.

St. Thomas More Scholar, University of San Diego, Law School, 63, 64, 65
Recent Cases Editor, University of San Diego Law Review, 1965

Founding Editor, The Woolsack, University of San Diego Law School, 1964

Dean's Scholarship, 1963 and 1964, University of San Diego Law School

American Jurisprudence Law Book Award (13 times)

Distinguished Trial Advocacy Plaque, American Board of Trial Advocates, 1965

Phi Delta Phi, Academic Excellence Award, 1965

(continued)

7. Continued

6/66 - 6/70	Hecsh, Hegner & Philbin Attorneys at Law	San Diego, CA	Partner (N.B. Adjunct Professor of Law, University of San Diego Law School, 9/69 - 6/70)
2/65 - 6/66	GD/Astronautics	San Diego, CA	Consultant Physicist
5/62 - 2/65	GD/Astronautics	San Diego, CA	Senior Physicist
3/61 - 5/62	GD/Convair	San Diego, CA	Physicist Assistant to Chief of Physics *
12-59 - 8/60	GD/Convair	San Diego, CA	Research Engineer
11/57 - 12/59	U.S. Air Force Active Duty	Texas and California	Student, Navigator- Bombardier
6/57 - 11/57	CD/Convair	San Diego, CA	Design Engineer

8. Continued

Lieutenant, U.S. Air Force, Navigator-Bombardier student, 11/57-12/59
 2nd Lieutenant, Commissioned, U.S. Air Force Reserve, 6/57
 From 9/49 to 4/54, Enlisted member of U.S. Naval Air Reserve
 From 4/54 to 6/57, Enlisted member of U.S. Air Force Reserve
 San Diego Civil Defense Speakers Bureau
 San Diego Education Resources Committee
 San Diego Mayor's Committee, Jobs for Veterans, 71-73
 Governor Reagan's Task Force, Jobs for Veterans, 71-73

10. Continued

Reserve Officers Association, Life Member
 National Guard Association of the United States, Life Member
 Theta Chi Fraternity, Past President, Gamma Theta Chapter, San Diego
 State College
 Navy League of U.S., San Diego Council, Board of Directors, 9/74-5/77
 Kearney Mesa Rotary Club, 73-84
 Ancient Order of Hibernians, District of Columbia, 84-Present
 Capitol Hill Club
 Army-Navy Club
 Royal Air Force Club (London)
 McGuire AFB, Officers Club

11. Continued

Distinguished Alumni Award, University of San Diego Law School, 1983
 Juris Doctorate, Summa Cum Laude, University of San Diego Law School,
 1965
 General Orvil A. Anderson Award, National Geographic Society, 1978
 Distinguished Graduate, Air War College, 1978
 Minute Man Hall of Fame, Reserve Officers Association, 1984
 Who's Who In America (since 1984)
 Man of the Year Award, NY Foreign Freight Forwarders and Brokers
 Association, 1989
 Cadet Colonel, Wing Commander, AFROTC, San Diego State College, 1956
 Chicago Tribune Gold Medal for Military Merit, 1956
 San Diego State College, Associated Students Honor Award in Air Science,
 1956
 Legion of Merit
 Meritorious Service Medal with 2 OLC
 Air Force Commendation Medal
 Navy Commendation Medal
 National Defense Service Medal
 Armed Forces Expeditionary Medal (Vietnam)
 Air Force Overseas Ribbon (Short)
 Armed Forces Reserve Medal with one Hourglass
 Naval Expert Marksmanship Medal (Rifle) with E
 Naval Expert Marksmanship Medal (Pistol) with E
 Air Force Training Ribbon
 Air Force Longevity Service Award Ribbon with five OLC
 Air Force Small Arms Expert Marksmanship Ribbon
 Air Force Organizational Excellence Award with OLC
 Air Force Outstanding Unit Award
 District of Columbia Distinguished Service Medal
 Oklahoma Distinguished Service Medal
 California Medal of Merit
 Chevalier, Sovereign Military Order of the Temple of Jerusalem
 Republic of Korea Presidential Unit Citation
 Air Force Association Distinguished Service Medal, 1987
 National Guard Association of the United States, Distinguished Service
 Medal, 1988

QUESTIONS OF THE CHAIRMAN AND THE ANSWERS THERETO

1. Why do you feel you are qualified to serve as an ICC Commissioner and as its Chairman? Why do you want to serve as a member of the ICC?

The Chairman of the ICC discharges two general responsibilities: (1) the general administration of the Commission subject to the general policies, decisions, findings and determinations of the Commission and (2) a quasi-legislative, quasi-judicial function performed within the boundaries of statutes enacted by the Congress.

I believe I possess the training, experience and temperament to perform the quasi-legislative and quasi-judicial functions of a Commissioner. Since November 1984, I have been a Commissioner of the Federal Maritime Commission performing duties which are very similar to those which I will be called upon to perform as an ICC Commissioner although pursuant to a different statutory scheme. For approximately five months in 1988 I was designated by the President as Acting Chairman of the Federal Maritime Commission.

From 1981-1984, I was Deputy Assistant Secretary of Defense for Reserve Affairs, responsible for the policy direction of over one million National Guardsmen and Reservists and oversight of a budget which in 1984 reached \$16.4 billion. From 1985-1988, I was the Commander (rank of Brigadier General) of the 1,500 military and civilian members of the District of Columbia Air National Guard who served in its two flying units. In 1988, I was made Commander (rank of

Major General) of the 3,000 military and civilian members of the New Jersey Air National Guard who serve in its three flying units at two separate bases, administering a current budget of approximately \$35 million.

I am an attorney admitted to the California Bar in 1966 and have also been admitted to practice before the Federal District Court, Southern District of California, the U.S. Court of Military Appeals and the Supreme Court of the United States. I have taught many different legal subjects at the University of San Diego Law School from 1966 to 1985 when I resigned as a tenured full professor in order to continue in Government service. My legal background makes me acutely aware of the role of independent agencies vis-a-vis the Congress. I recognize the ICC's responsibility to administer and enforce the laws enacted by the Congress in letter and spirit.

In all of these positions, I have had extensive dealings with the members of the Senate and House of Representatives and their staffs as well as agencies within the Executive Branch of government.

In sum, I believe I have a record of solid administrative and managerial experience and accomplishment which qualifies me to become the Administrative head of the ICC.

I wish to serve as a member of the ICC because I believe that I can bring attitudes, experience and skills to the position which will benefit the agency, the transportation industry and the performance of the agency's statutory responsibility.

2. What are your views regarding the future of the ICC?

I am aware that there are those who advocate the "sunsetting" of the ICC and without doubt the Congress has the authority to do so. If confirmed, and if the Congress decides to disestablish the agency, I shall, of course, do my utmost to carry out that mandate swiftly, efficiently and economically. But when I joined the Federal Maritime Commission in 1984, there were those who also advocated "sunsetting" that agency, a suggestion about which I had no opinion at the time due to lack of FMC experience. During my tenure at the FMC, however, I have concluded that although it could legally be disestablished, as a practical matter, it should not be sunsetted because if it were, most if not all, of its functions would only have to be reestablished or transferred to another Federal agency. The FMC at the very least performs within its statutory framework the essential function of being an honest broker or referee between the contending interests of the various components of the maritime industry. It has striven to establish and maintain a "level playing field" for these contending interests by seeking to enforce the statutes requiring fair competitive practices and has sought to eliminate unjust, unfair and discriminatory practices such as rebating, mislabeling of tariffs, abusive rate increases, outright fraud and the like. I believe that the FMC has performed its statutory duty very well during my tenure. I also believe that, if I am confirmed, my experience

at the ICC will probably lead me to a similar conclusion about that agency.

3. Are there any areas in which you have observed a need for change in either the direction or operation of the ICC? Do you have any immediate goals for the Commission?

Since I have not yet had occasion to become directly involved with the agency, my answer must be based on my study of materials written about it, internal documents, organizational charts, manning documents, legal decisions, etc. I have come to some tentative conclusions which may be subject to modification, with experience, if the Senate confirms my nomination.

I believe that the ICC should hold regular and frequent meetings, and to the extent possible, but recognizing the quasi-judicial character of the Commission, make them open to the public as required by the Government in the Sunshine Act. Only trivial or routine matters should be voted upon by notation without a full meeting of all of the Commissioners. Therefore, the current procedures used to manage the Commission's agenda must be reviewed and revised.

Informal communication between the Commission, the Congress and all of the components of the industry must be improved where it exists and established where it does not. To that end, I believe that the Congressional Liaison function and the Public Affairs/Industry Liaison function might be separated and enhanced under the direct, hands-on supervision of the Chairman.

In the recent past, the staff of the agency has been reduced from approximately 2,000 to 700 individuals. I have no way of knowing at this time whether that number of people is sufficient to efficiently carry out the statutory duties of the agency. Therefore, if I am confirmed, I would examine the current organizational structure, which in some areas at least appears to me to duplicate or divide functions, with a view towards streamlining the organization and reallocating existing staff resources to insure that all statutory functions are being performed efficiently, quickly and to the highest professional standards.

My immediate goal is to foster an atmosphere in which the Commissioners can function collegially and to raise the morale of the agency staff and re-motivate them to enhance their professionalism, efficiency, productivity, innovation and responsiveness. In general, I wish to refurbish the operation of the oldest regulatory agency in the government and restore its image as the "Queen of regulatory agencies" and the "arm of the Congress."

4. Do you have a general regulatory philosophy that you would bring to the ICC?

I sincerely believe that the sole function of any independent regulatory agency is to administer the laws that have been enacted by the Congress and, in general, not to make policy which should be the product of the legislative process. Therefore, personal philosophies should not be a factor in a Commissioner's official decisions. A Commissioner's only duty in any case presented is to determine what the law is and apply that law to the facts developed in that case. Where the law is vague or ambiguous, an attempt should be made to determine the intent of Congress in enacting the law made in search of guidance. Agency decisions arrived at in this manner may be regulatory or deregulatory in effect, but will not be the product of the Commissioners' personal philosophies, but only their understanding of the laws Congress has enacted and the facts of the case. I believe that regulatory policy should be made only by the Congress and not by the regulatory agencies. In my 5 and 1/2 years as an FMC Commissioner, I have followed this philosophy and would continue to do so if confirmed by the Senate.

5. As you have looked towards your possible confirmation as a member of the ICC, how would you compare the ICC's role with the role of the Federal Maritime Commission, where you are currently a Commissioner? What about your understanding of the principal philosophy of the Shipping Act as compared with the Interstate Commerce Act, looking at the Staggers Act and Motor Carrier Act amendments in particular?

The procedures of both the Federal Maritime Commission and the Interstate Commerce Commission are subject to the provisions of the Administrative Procedures Act and the Government In the Sunshine Act and consequently should be similar. The substantive laws although differing in specifics are generally similar in philosophy. Since the Shipping Act of 1916 was patterned after the Interstate Commerce Act, for many years the FMC and especially its predecessors relied heavily upon the decisions of the ICC as precedents. The Shipping Act of 1984, the Staggers Act and the Motor Carrier Act all had their genesis in the movement toward enactment of regulatory reform. In my opinion, all of these enactments were intended to eliminate unnecessary regulation, foster competition and thereby improve the economic health of the nation's transportation modes by greater reliance upon market forces as a regulatory mechanism. At the same time, these enactments were intended to protect other members of the transportation community, such as shippers, especially "captive shippers," from the imposition of predatory pricing and practices and unlawful discrimination stemming from monopoly power by requiring reasonable rates in situations of market dominance.

Generally, the legislative philosophy underpinning all three enactments seem to be very similar, although the primary focus of the FMC is on international rather than interstate surface transportation.

6. Do you have a view regarding proposals to further deregulate the trucking industry? Do you believe the ICC should play any role in advancing such proposals either legislatively or administratively?

At this time, I have no firm view regarding proposals to further deregulate the trucking industry although, if confirmed, future experience at the ICC will, I'm sure, lead me to some view point on the issues and I would make those views known to the Congress in an appropriate manner. However, in keeping with my views on the proper role of a regulatory agency, I do not believe my views or that of anyone else at the ICC should be used to administratively advance any regulatory restructuring in the absence of Congressional legislation.

7. What are your views on the possible impact of increased market concentration within the trucking industry, particularly within the less-than-truckload segment of the industry? It has been reported, for example, that the nation's five largest LTL carriers last year held approximately 44.5% of the LTL freight market, as compared with approximately 23.9% of the Market in 1979, the last year before enactment of the Motor Carrier Act. Revenue for these carriers was reported at \$6.7 billion in 1988 as compared with \$4 billion in 1979. Do you believe increased concentration has any long-term implications for shippers or the industry itself?

Since enactment of the Motor Carrier Act, there has been an overall increase in concentration of LTL traffic but only a minimum concentration in the TL sector. However, in most markets there has also been a correlative increase in LTL competition due to a broad expansion of existing carrier networks, consolidation of carriers and some expansion of larger LTL carriers to a national operation by extension or merger. In general, there has been an increase in competition and a decreased concentration in individual markets due to increase in the number of efficient carriers available to shippers. One can assume that market concentration which increases to the degree that only a few or worse a single carrier monopolizes the entire LTL traffic would create the prospect of predatory pricing, unfair practices and/or unjust discrimination among shippers. Therefore, I believe the ICC should monitor the trend toward concentration and notify the Congress if and when such concentration poses problems which might require legislative action.

8. What correlation, if any, do you see between safety and the ICC's regulatory activities insofar as motor carriers are concerned?

The Department of Transportation has primary jurisdiction over motor carrier safety issues. The role of the ICC is to utilize the safety ratings provided to it by DOT in deciding to grant or withhold authority to operate to new motor carriers and those seeking to expand their operating authority. I am informed that recently the Commission has been very conservative in its grant of authority to motor carriers with less than satisfactory safety records, an approach with which I fully concur. I believe the Commission should review its authority and procedures to revoke operating authority of motor carriers with questionable safety records to determine if further legislative action is warranted in this area.

9. The ICC has been called upon to consider the reasonableness of rates sought to be applied retroactively to shippers for transportation services rendered at negotiated but unfiled rates. This "negotiated rates" or "undercharge" issue has generated a great deal of controversy. What are your views on this issue and the ICC's actions in this area? Do you have any thoughts on the Supreme Court's decision to hear appeals in this matter?

The retroactive application to shippers of filed rates for transportation services rendered at negotiated but unfiled rates has arisen generally in the context of motor carrier bankruptcies. After the fact, auditors have claimed that shippers were undercharged by the carrier. The ICC's claim to primary subject matter jurisdiction over this issue has been upheld by four different U.S. Courts of Appeal and has been denied by only one. Since there is now a division of opinion within the Courts of Appeal, a Supreme Court decision harmonizing these disparate opinions is not only desirable but necessary. It may well be that the Supreme Court will find that this issue falls within the boundaries of the legal doctrine of promissory estoppel and that the ICC decisions in this area have been correct. Assuming that under existing statutes it is proper for a shipper and a carrier to negotiate an unfiled rate, it would be inequitable to require a blameless shipper, who had relied on the validity of the negotiated rate, thereafter to be forced to pay the higher tariff rate at the insistence of a non-party to the negotiated rate, such as a trustee in bankruptcy.

Generally, courts of law have held that regulatory agencies do not possess equitable powers beyond those

specifically granted by statute. For this reason, the decisions of the FMC have invariably favored the filed rate over the negotiated rate.

However, in light of the fact that four Courts of Appeal have upheld the negotiated rate doctrine, I believe the ICC should adhere to its view upholding the "negotiated rate" until the Supreme Court speaks definitively on the issue, at which time the Congress may wish to consider further legislation.

10. How would you assess the overall impact of the Motor Carrier Act of 1980 on the trucking industry and the shipping public?

Any assessment of the overall impact of the Motor Carrier Act of 1980 on the trucking industry and the shipping public is dependent upon the observer's perspective since the results can be described as mixed. Ease of entry has resulted in more competitive rates for shippers, but there have been many carrier bankruptcies with a resultant loss of jobs and there appears to be some trend toward concentration of traffic in fewer carriers, especially in the LTL arena. Perhaps it would be premature to decide whether or not the overall impact has been positive or negative until the industry has had more time to "shake out," although on balance, I believe the Act has resulted in a more efficient competitive motor carrier system benefitting the general public.

11. Based on your observations of the ICC and transportation issues, how would you characterize the concerns that have been raised about the Commission's implementation of the Staggers Rail Act of 1980? Do you have any general views regarding the genesis of this controversy, its resolution to date and future prospects?

My observations of the ICC have been limited to the three months since the date of my nomination and have been restricted further by my current position as an agency outsider.

I am aware, however, of the claim that the agency has tended to view the railroads with a more sympathetic eye than it has cast on other components of the transportation community, such as shippers, especially "captive shippers." Additionally, the agency reportedly has been criticized for pursuing further or total deregulation of the transportation industry regardless of the provisions of the ICA and the intent of the Congress. I have no basis upon which to evaluate the merits of these allegations since I was not involved with the agency during this period, nor have I read all of the Commission's decisions.

The genesis of these charges at least in part may have been unguarded public and private statements of agency insiders. Whatever the source of the allegations, the solution is to assure that all future Commission decisions adhere strictly to the letter and spirit of the existing law, thereby carrying out the intent of the Congress regardless of the personal opinions of the Commissioners. If the agency maximizes the number of its hearings, and adheres to the

letter and spirit of the law in its future decisions, the rumors of bias should soon be dispelled by the light of day.

I believe the Commission is legally bound to apply the existing law, even-handedly, without bias and without allowing personal philosophies to influence decisions.

12. In the Staggers Act, Congress sought to achieve less regulation of rail rates and more reliance on competitive market forces. The Act also provides that when "a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable." How would you seek to interpret this provision?

The Staggers Act was, generally speaking, deregulatory in nature. However, railroad deregulation was never intended by the Congress to erase all regulation of railroads. The intention, in general, was to deregulate where open competition existed and market forces could be relied upon as a "natural" regulatory device. Where such open competition did not exist, it was contemplated that some form of government regulation would continue to be required. Obviously, the quoted phrase pertains to the latter situation and was intended by Congress to protect "captive shippers" with no alternative means of transportation" from being charged confiscatory rates by railroads where there were no practical alternative services available to them to ship their products to market. What constitutes "market dominance" in a particular case is a mixed question of fact and law, as is what constitutes a "reasonable rate." But in general terms, it appears that Congress intended that "captive shippers" were not to be made economic hostages to "whatever the traffic will bear" railroad transportation rates. In such cases, simplistically stated, I believe Congress intended that the railroad was to charge a rate which included all of the costs of providing the service plus a reasonable profit. The ICC has developed guidelines to determine the allowable upper

limit of a rate for a market-dominant railroad movement pursuant to a theory of "constrained market pricing." I shall, if confirmed, review these guidelines before I vote to apply them to a particular case.

13. To what extent do you believe the ICC should use its discretion to order "competitive access" to promote competition within the rail industry?

Since the answer to this question intrinsically depends on the application of the law to a wide variety of possible facts, I don't believe that a definitive specific answer to this question is possible. When presented with a specific set of actual facts, I believe the Commission must apply the existing law in light of the needs of shippers for reasonable transportation rates and the needs of the rail carriers to maintain an economically viable operation. Each case is unique and will require the Commission to balance all of the competing interests to arrive at an equitable decision. I support the current ICC rules which require use of mandatory access or mandatory switching where it is necessary to remedy or prevent anti-competitive behavior.

14. How well do you believe the Staggers Rail Act of 1980 has worked in its goal of improving the health of the nation's rail industry?

My research has led me to conclude that the Staggers Act saved the nation's rail industry from financial collapse.

Railroad profits and service levels have steadily improved and costs have decreased. ICC now indicates that rail rates, adjusted for inflation, have fallen significantly since enactment. Although individual results vary, in general, Staggers has resulted in lower rates, and improved service and profits.

15. Do you believe that anything more needs to be done to improve ICC procedures insofar as they relate to the ability of small shippers to initiate and pursue rail rate cases?

The ability of small shippers to initiate and pursue rail rate cases is affected by the complexities, time and cost of the procedures established by the ICC. If these procedures are so complex, time consuming and costly that they discourage small shippers from "having their day in court," then justice is not well served. If confirmed, I would review Commission procedures with a view toward simplification of procedures and minimization of the time required to decide these cases. The recent adoption of the Uniform Rail Costing System by the ICC should be a step in the right direction, but more may be required to solve the problem.

16. What are your general views on the role of labor protection in connection with rail line sales, abandonment applications and requests for merger authority?

Section 11347 mandates that a rail carrier involved in a transaction requiring ICC approval shall be required to provide protection to its employees affected by the transaction. I have no reason to question the merits of this Congressional enactment and, if confirmed, I would apply this statute to cases coming before the Commission as I would apply all other sections of the law. This section, as are all other sections of the applicable law, is an expression of policy by the Congress and the ICC does not have any authority to selectively enforce the law as it sees fit.

The basic problem is the resolution of the relationship between the Interstate Commerce Act and the Railroad Labor Act. Since the ICC presently has before it some very difficult and contentious issues about the provision of labor protection to certain current transactions, issues which are the subject of a Commission hearing on February 9, I do not feel at liberty to comment in any greater detail on this subject.

17. Do you have any views on either the legislation authorizing new authority or the extent of the existing authority on the part of the non-carriers, for the purpose of protecting the public interest in maintenance of the rail line proposed for acquisition?

Section 11343 generally requires the approval and authorization of the ICC for certain consolidations, mergers and acquisition of control of Class I rail carriers by persons or entities that are carriers or are identified with other carriers. In the past, the issues generally focused on whether there was adequate protection of labor interests. Recently, there has been Congressional concern expressed about the ICC's limited authority to review acquisitions of rail carriers by non-carriers in light of the problems that have surfaced in highly-leveraged buy outs of corporations in other sectors of the economy. In light of these events and the policy to maintain a viable railroad system, it is understandable that the Congress would be concerned about railroad acquisitions by any entity, carrier or non-carrier, the financial structure of which cast into doubt the acquired railroad's future ability to continue adequate rail service and obtain capital to invest in equipment maintenance and modernization; in short, its ability to continue as a viable operating railroad. Certainly, the ICC should carefully examine the adequacy of its current authority over acquisitions by non-carriers and be prepared to respond to the Congress as appropriate.

18. In 1988, the ICC approved the merger of the nation's two largest bus companies, Trailways Lines, Inc., and Greyhound Lines. How do you view the state of interstate bus transportation in light of this merger and other factors such as the Bus Regulatory Reform Act of 1982?

Interstate bus transportation continues to experience intense competition from Amtrak, the airlines and private autos, a situation likely to continue. Considering the parlous financial condition of Trailways Lines, Inc., the ICC had no alternative but to approve the merger. On the positive side, it appears that the economic health of Greyhound is improving to a degree.

STATEMENT OF EDWARD J. PHILBIN

Mr. PHILBIN. Thank you, sir.

Mr. Chairman, Senator Rockefeller, I am deeply honored to appear before you this afternoon as President Bush's nominee to be a member of the Interstate Commerce Commission and to serve as its Chairman.

With your permission, Mr. Chairman, I would like to express my deep appreciation to my Congressman and good friend, Bill Lowery, and also to Senator Wilson for their most gracious and complimentary introductions.

I would also like to acknowledge the presence here in the chamber of many friends but especially that of my wife, Vivian, who has illuminated my life with two wonderful sons, Matthew Brendan who is 18 months old, and Michael Sean who was born exactly one week ago today.

Again with your permission, Mr. Chairman, I would like to summarize for the committee my regulatory philosophy. I believe that under current law, the sole function of any independent regulatory agency is to administer the laws that have been enacted by the Congress. Independent regulatory agencies should not, generally speaking, attempt to make policy, in my view. Policy should be the product of the legislative process. In those instances where the law is vague or ambiguous, regulatory agencies should seek guidance by attempting to determine the intent of the Congress in enacting the law.

I believe that personal philosophies, whether deregulatory or re-regulatory, should not be interjected into a commissioner's official decisions. A commissioner's sole authority and a commissioner's only duty in any case presented is to determine what the law is and to apply the letter and the spirit of the law to the facts developed by the evidence in the case. Decisions arrived at in this manner may be regulatory or deregulatory in effect but should not be influenced by the commissioner's personal philosophies but only by the commissioner's understanding of the applicable law and the facts of the case.

In my five and a half years as a Federal Maritime Commissioner I have strictly followed this philosophy, and I would continue to do so at the Interstate Commerce Commission if confirmed by the Senate. Nevertheless, I have been asked if I am a deregulatory or a reregulator, and I find it difficult to apply either label to my views.

The movement toward regulatory reform which produced the Staggers Act, the Motor Carrier Act and the Shipping Act of 1984 was intended to eliminate unnecessary regulation, foster competition and thereby improve the economic health of the Nation's transportation modes by placing greater reliance upon market forces as a regulatory mechanism.

These enactments were also intended to protect other members of the transportation community such as captive shippers from the imposition of confiscatory rates, unfair practices and other forms of unlawful discrimination stemming from monopoly power by requiring, among other things, reasonable rates in situations of carrier market dominance. I sincerely agree with the philosophy.

Certainly the Congress did not intend that the movement toward deregulation have as its objective the obliteration of all regulation. I believe that the Congress intended to deregulate where free and open competition existed and market forces could be relied upon as a natural regulatory mechanism. In those situations where free and open competition did not exist, I believe the Congress contemplated that some form of government regulation would continue to be necessary. I agree with the thrust of this regulatory reform but I must leave it to others more expert at labeling than I to choose the proper title for those views.

Finally, Mr. Chairman, I believe that my record as a Federal Maritime Commissioner and as a former Acting Chairman of the FMC, as a Deputy Assistant Secretary of Defense for Reserve Affairs, as Commander, first of the District of Columbia Air National Guard and then of the New Jersey Air National Guard, as a law professor and as a practicing attorney provides you with evidence of solid judicial, administrative and managerial performance which qualifies me to become a commissioner of the ICC and its chairman.

If confirmed by the Senate, I believe that I can bring experience, attitudes and skills to bear which will benefit the ICC and the industry and which will assist me, working collegially with my fellow commissioners, in refurbishing the operation of the oldest regulatory agency in the government and to enhance its illustrious image as the queen of regulatory agencies and the arm of the Congress.

To that end, if confirmed I would work closely with the Congress as I have in the past to ensure that both the letter and the spirit of the Interstate Commerce Act is the basis for the future decisions of the Interstate Commerce Commission.

Mr. Chairman, thank you for the honor of appearing before this committee as the President's nominee and to make this statement. I will do my best to answer any questions that committee members may wish to ask.

Senator EXON. Mr. Philbin, thank you very much. We have just had the half-time bell. Senator Rockefeller, as I understand it, cannot come back.

Do you wish to ask a question?

Senator ROCKEFELLER. Mr. Philbin, first of all, your opening statement was magnificent. If you just took the first part of that and etched it in stone, I am yours. I mean, that was terrific.

I do have some questions that I want to ask and, frankly, I am somewhat embarrassed because we have had an emergency meeting of coal state Senators over this whole question of the Clean Air Act and how we are going to handle ourselves. That is to start at 2:15 p.m. immediately after this vote, and I have to go to that.

I cannot imagine anything taking precedence over a confirmation hearing of this sort on this subject with this particular Commission, so I will submit questions. I may try to get Senator Exon to ask a couple of them, but I will submit them. They are general in nature, and some are fairly specific but I think they will be useful.

I certainly like your philosophical approach a lot.

I guess we will recess now just for a few minutes.

[Brief recess.]

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Mr. Chairman, thank you for giving your prompt attention to this nomination.

It has been nearly three months since this committee confirmed Edward Emmett to be a member of the ICC. At that time, I joined my colleagues from Nebraska and Montana in expressing our concerns about the growing shortage of jumbo covered hopper cars.

I had hoped that the problem would cure itself with the passage of time. It has not.

Mr. Chairman, I have a number of questions regarding this shortage that is having serious consequences for the Midwest. In preparation for this confirmation, I talked to a number of grain elevator operators throughout South Dakota. Their message was clear: we need more cars. Many elevators are still waiting for trains that were ordered in November and December.

I hope to convey to you, Mr. Philbin, that the rail car shortage is close to crisis proportions. The U.S. Department of Agriculture's Office of Transportation is telling us that things will be getting progressively worse.

There are a number of factors contributing to the shortage. The corn harvest has been good. The Soviets made an unusually large grain purchase. Barge traffic on the Mississippi has slowed down.

I am most concerned, however, about what may be an artificial limitation on the supply of regular tariff cars. The Burlington Northern Railroad's use of its Certificate of Transportation, or COT, program has diminished the availability of rail cars. This is an issue that you will soon be examining as a member of the ICC.

The shortage of grain cars has a direct effect on the individual farmer, whose transportation costs are soaring. Many grain elevators cannot even accept additional grain because of the lack of transportation.

The shortage also has an impact on our export markets. In short, I urge you to take a close look at the situation before it becomes even more critical.

So, with that, I do not know how far you had proceeded with your opening statement.

Mr. PHILBIN. I had completed it, Senator.

Senator PRESSLER. All right. I have some questions that I will direct to you, if that is agreeable. And I will direct just two questions, then I will turn it over to my colleagues.

Mr. Philbin, I have spoken at length about the shortage of grain cars. What do you think has led to this shortage?

Mr. PHILBIN. Sir, I am aware of the problem. And as you have said, it has been exacerbated during the peak season by the 318 million bushels that the Soviets purchased, and it was further exacerbated by the fact that it had to be delivered by the end of calendar year 1989.

As you know, there has always been a problem with the availability of those cars during the peak season. And this year seems to be particularly bad.

I am informed that the railroads, the Union Pacific and the Burlington Northern in particular, have met the problem by trying to increase their operating efficiencies, for example, by improving

their car turn-around times. And they have been successful to a large degree, but certainly not to the point where they can solve the problem at the moment.

The crux of the problem is the availability of capital investment to buy more cars, which, for a large portion of the year, are underutilized.

I do not have an answer for you, Senator, but I can tell you that if I am confirmed I will take a very hard look at that issue and see if there is not something that the ICC can do to get involved in that.

Senator PRESSLER. Now the Burlington Northern says that no more than 40 percent of its fleet is obligated to the COT program. Can you provide me with an analysis of the number of cars in the Burlington Northern fleet that participate in the Certificate of Transportation program on a state-by-state basis.

Mr. PHILBIN. Sir, I would have to supply that for the record.

Senator PRESSLER. All right, fine.

[The following information was subsequently received for the record:]



Interstate Commerce Commission
Washington, D. C. 20423

Office of the Chairman

February 16, 1990

The Honorable Larry Pressler
United States Senate
Washington, D.C. 20501

Dear Senator Pressler:

This letter is in response to your request at the Commerce Committee's February 6 hearing on my nomination to become a Commissioner and Chairman of the Interstate Commerce Commission (ICC) that I provide you with an analysis of the number of cars in the Burlington Northern fleet that participate in the Certificate of Transportation (COT) program on a state-by-state basis.

The total number of grain cars controlled through ownership or leases by Burlington Northern (BN) is in the range of 25,000 - 26,000. Burlington Northern promised to place no more than 40% of its total grain transportation capacity in the program. In actuality, the number of grain cars loaded under the program has varied from 15% to 38% of total grain loadings. During January, 31.4% of the total grain loadings were under the COT program.

The COT program is not allocated on a state-by-state basis. Basically, BN offers a certificate of transportation for sale, which guarantees the purchaser transportation service, originating at a specific location, heading in a specified direction on a particular date. The allocation of points of origin is based upon the amount of grain in a given area. Consequently, fewer COT trains depart from points of origin within some states than from other states.

In order to respond to your question, BN was requested to provide an approximation of the numbers originating in the various states. The data supplied by BN, dated February 9, is presented in the enclosure.

If you have any further questions on this or any other matter, please inform me at your earliest convenience.

Sincerely,

Edward J. Philbin

Edward J. Philbin
Chairman

Enclosure

1989 CARLOADINGS IN COT LOADING STATES ONLY

	general distribution	cots (shipping period 1989)	total	%cots/total
ND	64,940	9,991	74,931	13.3
NE	74,132	14,363	88,495	16.2
SD	33,465	9,428	42,893	22.0
MT	27,384	5,643	33,027	17.1
CO	5,519	1,252	6,771	18.5
IA	21,504	3,038	24,542	12.5
KS	14,930	2,511	17,441	14.4
MN	53,693	11,506	65,199	17.6
OK	5,198	932	6,130	15.2
MO	15,061	1,106	16,167	6.8
TX	13,427	1,586	15,013	10.6
WA	20,166	1,465	21,631	6.8
WY	1,623	356	1,979	18.0
TOTAL*	351042	63197	414239	15.3

* TOTAL FOR COT LOADING STATES ONLY, ADDITIONAL GRAIN TRAFFIC
GENERATED IN STATES NOT PARTICIPATING IN THE 1989 COT PROGRAM.

Mr. PHILBIN. There is a case involving Burlington Northern before the ICC at the moment, and I think it is probably not proper for me to go too far into the details of that case.

Senator PRESSLER. Yes. Will you participate in the National Grain and Feed Association versus Burlington Northern? That is probably the one you are talking about?

Mr. PHILBIN. I probably will, if confirmed.

Senator PRESSLER. Good.

Senator Gorton.

Senator GORTON. Can you explain to me your general philosophy and attitude toward the continuing rail abandonments of secondary lines? And also over the degree to which you believe it appropriate for the ICC to hold hearings on those abandonments?

Mr. PHILBIN. Well, sir, let me say in response to that question that there are also some cases involving rail abandonments before the ICC, and I do not want to give any impression or prejudging those cases.

But, with regard to the abandonment procedure that the ICC uses, it requires a vote of the Commission to investigate a particular case and at that point the Commission could then further vote to have local hearings.

The outcome of those votes, of course, depend on the particular facts of the case, the availability of resources, travel monies, per diems, and so forth.

I can tell you in general terms that I think that a local hearing in an abandonment case has a very salutary effect. It not only keeps the Commission informed of the facts gathered by an administrative law judge or perhaps by one of the Commissioners, but at the same time it not only gives the people in the local community the opportunity to voice their views but also gives them the perception of having had every opportunity to do that.

And I would say that, in general, I tend to lean in favor of leaving local hearings.

Senator GORTON. I find that to be a very satisfactory answer. And simply in following up on it, and again, not speaking of any particular appeal before you, what are the kind of considerations which will go through your own mind in making that determination as to whether to have a hearing?

Mr. PHILBIN. Well, some of the general considerations would be the economic impact of the abandonment on the community, the availability of alternate service for the community, whether in fact the railroad is losing money by maintaining those lines that they intend to abandon, the availability of alternate uses for the right of way and the trackage and so forth.

Those are the general types of considerations that I would be looking for.

Senator GORTON. And of course impacts on the communities affected, I assume?

Mr. PHILBIN. I think that has got to be a very large factor.

Senator GORTON. Thank you, Mr. Philbin, very much.

Thank you, Mr. Chairman.

Senator EXON. Senator Kasten.

Senator KASTEN. Mr. Chairman, thank you, first of all. I have got six questions here that I would like to submit for the record, Mr. Chairman.

Senator EXON. Without objection, that is so ordered.

Senator KASTEN. Let me just ask one kind of general question. The railroads are subject to a number of unique rules, including the Federal Employers Liability Act, railroad retirement, labor protection requirements, secondary picketing; there are a whole series of things that are unique to the railroad industry.

The ICC does not have jurisdiction over all of these issues. But, just in general, I wonder whether you think that we should have all these special rules for one segment of our highly regulated—or I should say highly competitive—integrated transportation system? Generally speaking, do you think we should have all these different kinds of special rules for one segment of our transportation industry?

Mr. PHILBIN. Senator, I really have no basis at this time to give you an informed answer to that. Many of the specific rules which apply, to railroads only were promulgated by the Congress, and I have no reason to argue with the policy embodied in those enactments.

The current problem, of course, is the determination of the interrelationship between the Interstate Commerce Act and the Railway Labor Act. The unfortunately is a matter which is now before the ICC in a rather contentious case, and I really do not think that I am permitted to say much more, so as not to offer any prejudgments on that case.

Senator KASTEN. Mr. Chairman, I do not have any other questions at this time, and I will put the other questions in the record.

Senator EXON. Senator Kasten, thank you very much.

I understand my colleague from South Dakota had asked some questions and had one or two more, and I am pleased to recognize you, Senator Pressler.

Senator PRESSLER. I just want to get your philosophy regarding the shortage of grain cars. And if you have already answered this, you need not repeat it.

As a member of the ICC, what do you see as your responsibility and your role in finding solutions to this ongoing shortage of grain cars that we are faced with? What can you do?

Mr. PHILBIN. Senator, we would have to examine our own jurisdiction at the ICC to see if there was any statutory mechanism by which we could interject ourselves in the case. And then, of course, we would have to decide whether our involvement in the case would help or hurt the situation.

It is not a new issue. I am sure it has been examined many, many times before. And I am not aware of any suggestions of a specific remedy that the ICC might be able to apply.

I have carefully read the Scott 5 decision, which dealt with the grain car issue in certain aspects. I found that, in general, to be a well-reasoned decision by the ICC. But there are still open issues with regard to, for example, Burlington Northern and their COT program.

More than that, I do not think I can tell you.

Senator PRESSLER. Well, I hope you aggressively use what jurisdiction you have.

Another area that I hope you aggressively use your jurisdiction is in the area of leveraged buyouts. I appeared before the ICC this past year and made the argument that, where there was one LBO, a common carrier obligation does exist in the railroad area and transportation. Where we have one or two carriers, bought by a complete stranger or a foreign company or otherwise, it could be very serious.

Now on the leveraged buyouts of transportation, and especially railroads, what is your view?

Mr. PHILBIN. I have examined that issue to some degree, Senator. And I find that the statutes give the ICC jurisdiction to examine and control these transactions most of the time only where carriers are acquiring other carriers.

With regard to the acquisitions by non-carriers, the ICC jurisdiction is very, very limited.

But I have to tell you that in my estimation if the Congress was serious about the continued viability of railroads and their acquisition by other railroads that in light of the problems that have arisen in other areas of the economy with highly leveraged buyouts, the Congress probably is reasonable in its concern about non-carrier acquisitions of railroads.

If the buyout is so highly leveraged as to saddle the acquired railroads with tremendous debt, and then their best assets are sold off, the acquisition could affect the viability of the acquired railroad to continue as a railroad. And I think it is very rational that the Congress should be concerned about that.

Senator EXON. Senator Pressler, thank you very much.

I am sorry I had to leave to vote. And I have some questions and we probably will have some other questions by the committee. And I am very pleased to see that Senator Burns has joined us, and I will recognize him in proper order now that the Chairman has a chance to ask some questions.

First, in reading your background and looking at your history, Mr. Philbin, I am very impressed. As I understand it, you are not only a graduate engineer, but a graduate lawyer, and have served as a General in one of our most important posts, is that correct?

Mr. PHILBIN. Yes, sir, it is.

Senator EXON. I would only suggest somewhat in jest that that is probably the most dangerous mixture of professions that I have ever seen. I am not a lawyer, but I know you are, and at some appropriate time, if you think it would enhance your chances of being confirmed, we would consider a plea bargain of some kind to correct the record in that area, Mr. Philbin.

But, in any event, I am impressed with your background, speaking very seriously now.

I have a few questions, and after my initial round is up, I will pause and go to the other members of the committee. I also have a couple of questions that Senator Rockefeller left with me that he did not have a chance to ask.

Let me first go to this matter of the hopper cars. I was interested in your statement that this has been going on for a long, long time.

Yes, indeed, in eight years as Governor of Nebraska, I believe six of the eight years we had a hopper car shortage problem each and every year, somewhat different, though, than this period of time. Because in those days the grain was being shipped primarily to New Orleans, and we had trouble with the ports there not being able to unload the cars quickly enough.

Now we have a similar situation, but it is more or less in Seattle on the West Coast, evidently because we are shipping more into the Pacific Rim.

There is no immediate answer to this problem, and there is not going to be any immediate answer in the future, in my view, since I have had as much experience as anyone in this area. I do hope that the ICC continue to monitor this situation as best you can.

The facts of the matter are that this year and the year after this and the year after this and the next hundred years, we are never ever going to have enough grain cars available when everybody wants to ship grain at the same time. And therein lies the problem.

Now, one of the things that I hope that the ICC would continue to monitor in this area is to make sure that the railroads live up to their obligation of not contracting in advance for more than 40 percent of the fleet and leaving the other 60 percent on call.

I have monitored that from time to time, and I feel that the railroads are doing generally a good job in that area. Again, it is not a precise science, but I think, as near as I can tell, they are trying to carry out the intent of that piece of legislation.

Any time that we have shortages like this, though, it is only natural to look around and see if I did not get a grain car, why did I not get a grain car? And am I being unfairly treated?

I would certainly hope that the railroads would lean over backward, and that the ICC, in this particular regard, would do some monitoring to make certain that there is that level playing field that we tried to establish for long-time fairness.

So I would suggest to you that certainly there is no answer to the proposition that we are facing right now, which is especially critical and hurting an awful lot of people and costing an awful lot of people an awful lot of money because they assumed that they would be able to ship grain at a certain day and at a certain price, and now they cannot make delivery.

It is going to take advanced planning, I think, on the part of many. I was particularly pleased that finally, at a very recent date, the Secretary of Agriculture decided to rescind his order to release some government-stored and owned grain at this time, right in the middle of the major problem with grain car shipments.

Possibly, I might suggest that the ICC perhaps set up, if they could, and if you think it is wise as the Chairman of the Commission, a long-term monitoring plan of some kind to see what is going on in the flows, and check this out from time to time, just to alert everyone to the fact that we are watching this.

And also, to cooperate and advise the Department of Agriculture so that they do not come along again in the middle of a major crisis and contribute to making that crisis worse by pulling government grain at the wrong time.

I think there are some things that government-wide we could be doing on these things, and I would simply recommend that to you

as a possible suggestion for the ICC to become more involved in this than they are now.

Getting back to some other specific questions. I was particularly interested in that part of your opening statement, Mr. Philbin, wherein you expressed a view that the sole function of any independent regulatory agency is to administer the laws that have been enacted by the Congress, and not to attempt to make policy.

I think that is a good statement that I and most of the members of this committee agree with that.

However, I think, having said that, we must know and recognize that there are some areas where some people perceive that the ICC has some responsibility or authority, or at least should have some interest that may not be clearly spelled out.

So I am glad that you are not making laws, I just hope that all would understand that the ICC is there as a body that we can turn to for some advice and counsel, and maybe from time to time, some examinations into what is going on.

And I think if we had that kind of an attitude develop, we might be able to steer away from some of the difficulties that we have experienced in the past.

You also talked some about some of the other activities of the Commission and how it might act in certain areas, where the Commission is vested with discretion. I would like to ask you about the responsibility the Commission is vested with on competitive rail access, for an example.

You may not have a clear-cut plan on that or a firm feeling in your mind as to how you would approach it, but I suspect that you have done a great deal of study in preparing for this new position to which the President has recommended you.

Have you looked at any of the difficulties with regard to competitive rail access? And do you have any feelings on that matter that you would care to express to us today?

Mr. PHILBIN. I must confess, Senator, that in that particular area I have only been able to skim over some of the cases, but I can tell you that my philosophy on that is what I perceive the law to require. And that is that the ICC should involve itself in forcing access in those situations where there is either an existing anti-competitive situation or the potential of one.

And I think that the ICC clearly has the authority to do that. Again, the decision depends on the particular facts of the case and the various value judgments that have to go into that decision.

I do not have any qualms about exercising the law to its maximum where required.

Senator EXON. Thank you, Mr. Philbin. I do not think we could ask for anything more direct and forthright than the statement you just made. And I really think that is all that we expect, those of us who have oversight responsibilities in this area.

You stated in response to one of the pre-hearing questions that you believe the ICC should hold regular and frequent meetings. Would you please elaborate on this?

And let me ask you if you have any specific guidelines in this particular area that you might suggest as Chairman?

Mr. PHILBIN. Yes, sir.

I believe that the Government in the Sunshine Act requires regulatory agencies to have regular meetings.

Now, not all of those meetings are open to the public under the Sunshine Act itself. There are circumstances in which the meetings should be closed to the public, although the Commissioners all meet in a formal array and make their decisions.

Those are usually cases involving enforcement activities, the possibility of issuing a subpoena, and so forth. But I think that the work of the Commission should not be done primarily by notation.

We do use notation voting at the FMC, and I think that the guideline to the staff should be that only routine or trivial matters coming before the Commission should be handled by notation.

All of the rest, matters that require substantive decisions to be made, should be handled in a formal hearing before the Commissioners. And I do not see any problem with switching into that mode very, very quickly.

But I have heard the term "open hearings" used rather loosely. Not all of those hearings can be open under the existing law.

Senator EXON. Thank you. My time is up on on the first round.

I am very pleased to recognize Senator Burns.

Senator BURNS. Thank you, Mr. Chairman. It is nice to see you, Mr. Philbin, and I want to express my gratitude for coming by the office. We talked about a few things down there and, by the way, the hopper car business in Montana is no better now than it was when we visited. I guess what concerns me is the infrastructure of our rail system right now and the ability to move grain.

I understand that, since Christmas or since right before the holidays, some orders have been placed for new and refurbished hopper cars, and although I know it is tough, it is like the Chairman said, and I concur with that, that it is pretty tough to build a church for the Easter crowd, so to speak, whenever, but it is costly.

Have you looked into the area of what we do as captive shippers? We have only one railroad in the state of Montana and, sure, we have the COTs and we are told that they have not used up all the COTs, but yet we are not getting cars. And we had no other choice other than trucks and, of course, that is a little bit slower than the unit trains. So I am wondering, should we be looking into something that protects those states that are bona fide captive shippers as far as the railroad is concerned?

Mr. PHILBIN. I think the ICC should be concerned with captive shippers in states such as you have described. As Senator Exon says, I am not sure there is ever going to be an answer to the grain car issue because of the cyclical nature of the shipments required and the high shipment numbers required during peak periods, but certainly the ICC can look into those particular areas where there are captive shippers and make sure that they are getting a fair shake from the railroads regarding the availability of the cars. But what that mechanism might be, what direction we might take, I cannot predict at this time.

Senator BURNS. Well, You impressed me as having a handle on this business of transportation, and I congratulate you for even wanting the job, especially with the mix of your education and your disciplines. I appreciate that. Those are the issues that I am concerned about Mr. Chairman.

I have no other questions. I am just concerned that the railroads really take serious this business of maintaining a hopper car fleet.

I think that as time goes on, with the events in Eastern Europe, American agriculture is going to be asked to move a lot of products to feed a lot of people around this world until their infrastructure is rebuilt and it would be sad if we would not get that grain either. I know we had a circumstance this year where we had a big crop and we had a bigger crop. We did not drought out, and we had the Mississippi River frozen up and it was low. And then we had some areas where you had competitive railroads knowing that Montana wheat is going to be there when we get back.

And I have some very serious problems in dealing with that. And so, as a captive shipper, I certainly applaud you taking an initiative to address those problems. I thank you, Mr. Chairman.

Senator EXON. Thank you, Senator Burns.

Following up on the statements that have just been made by the distinguished Senator from Montana, I would like to point out that possibly the Interstate Commerce Commission can look into the matter, as serious as this seems to be every year or every other year. One of the problems that I think is making the situation worse right now is that evidently there does not seem to be the capacity or the coordination to unload these cars as fast as they should be unloaded at the ports, and while we talk about rail cars and their availability, that is very important, but if we had more rail cars available at this time, the end result might be that two-thirds of the additional rail cars would be stacked up in Seattle waiting unloading.

Mr. PHILBIN. That could very well be part of the problem.

Senator EXON. So, I think maybe this matter could be improved, if we could look at some of these things and do a little more advanced planning than we have done before. Perhaps some of the information should be going out earlier to the railroads, providing advanced planning as to how many cars are being ordered, what the situation is, what the market looks like with regard to when it might be clogged. Perhaps information like that would be an additional service to the shipping industry and the people who rely on that shipping industry and the farmers to move their grain to market.

I have not been satisfied with the fact that each and every year we say well, this is a problem that has occurred before and it will occur again, and it has. I guess that we have not done enough to try to find solutions to this problem. One solution might be to encourage further investment in the facilities to unload or load the grain at the ports.

Mr. PHILBIN. The problem, as I understand it, is that forecasting the demand in any period in the future is extremely difficult, this year is an example. Of the grain that goes to the lower Mississippi ports, about 83 percent is carried by barge.

The Mississippi water level dropped and froze up in addition. Some of the locks operationally went out of commission, and all of that grain had to be shipped by some other transportation mode. These events are essentially unpredictable. But I think we always have to keep looking to see if there is a better way.

I must say that from the information I have gathered that the railroads, specifically Burlington Northern and UP and I am sure others, have, in fact, done their very best try and respond to this excessively higher peak demand.

For example, they have reduced the trip time for a grain car from an average of 25 days last year to something like 16 and a half days this year, and are doing their best with what they have to meet the demand. But I agree with you that it must be looked at. We know it is coming again next year, and we have to see if there are other methods that we can supply.

Senator EXON. Thank you very much, Mr. Philbin.

Two questions now that Senator Rockefeller asked that I pose to you. First, as you know, the Commission earlier this year adjusted the rail cost adjustment factor, the rail inflation index, to include rail productivity gains. Do you know of any reason why the Commission should retreat from this decision or substantially revise that index?

Mr. PHILBIN. No, sir. I know of no such reason.

But with experience I may.

Senator EXON. I wanted to give you a chance to put that caveat in.

The last question by Senator Rockefeller is whether you think that under the law the ICC has the obligation to balance the interest of the railroads with the interest of the shippers and communities and others?

Mr. PHILBIN. Absolutely.

Senator EXON. Back to the questions that I have now. What is your opinion of the short line railroad situation? I know that is tied up in the courts to some extent now, and I suspect that you have done some reading regarding the matter.

I'd like to know what responsibility you see for the Commission in this area? I am very interested in this issue as one who has studied this matter and given the fact that I am very concerned about continued rail service to certain parts of our country, particularly in areas where there are likely to be more short line or alternatively, where there may be a loss of service. That is why the short lines in some instances have been a very worthy additions, to our overall transportation network—meeting our overall transportation needs.

What about the short line matter and what role do you think the ICC likely to play in helping to maintain a railroad, whether it is a railroad under our traditional guidelines or whether it is a short line railroad?

Mr. PHILBIN. One of the facets of the transportation policy, which is embedded in the Interstate Commerce Act, is the maintenance of a viable railroad system, not only for economic purposes, but also to serve defense needs in time of conflict or in time of danger.

I have read to some degree about the short line development, and it seems to me that that is a marvelous way to maintain the road beds and the viability of the components of the railroad network whether as a piece of a larger railroad or an appendix of a railroad. It also seems to me to be a very good way to make sure that remote communities which cannot economically be served by a

large railroad might continue to be served by one of the short lines. I thought it was a very good idea.

The particular role of the ICC, of course, depends upon statute, but I think in general the ICC should try and encourage that sort of thing.

Senator EXON. As you know, the ICC's implementation of the Staggers Rail Act of 1980 has been highly controversial, to put it mildly. Generally speaking, what balancing do you feel Congress intended insofar as shipper interests and carrier revenue needs are concerned, and what are your suggestions in this area?

Mr. PHILBIN. Well, I would go back to my basic philosophy, Senator Exon. I think that if the Commission follows the letter and the spirit of the law in its decisions that the Staggers Act will, in fact, lead to the type of decisions that Congress intended.

In essence, where there was open and free competition Congress wanted that competition to be the regulatory mechanism to keep balancing the interest of the shippers and the railroads and the public and the military, but where that free and open competition did not exist, obviously the Congress intended that the ICC regulate the situation to make sure that shippers received a fair shake from the railroads and that big shippers did not get a better deal than the little shippers because the category of shippers is not homogeneous. There are all kinds of competing interests within the shipper community itself.

I think that is what the ICC was intended to do, and that is what I think it should do.

Senator EXON. Thank you, Mr. Philbin.

Do you believe that the ICC has the authority and the responsibility to act on its own initiative to prevent alleged railroad abuses when they come to the attention of the commission?

Mr. PHILBIN. I think it does have the authority to act on its own initiative, but I do not think that it can go beyond the authority which Congress has given to it in the statutes, and if the Commission wanted to go beyond that authority, I would object.

Senator EXON. Another way of interpreting your answer, then, would be that you believe that the act has certain restrictions on how far the ICC can go, and if the Congress wishes the ICC to go beyond what you think is spelled out in the law, then we should change the law.

Mr. PHILBIN. Yes, sir. If Congress gives me the baseball bat, I will swing it.

Senator EXON. The transportation brokers, let us get into that just a little bit.

Brokers, of course, are intermediaries who arrange for transportation services. Currently, transportation brokers must register with the ICC and post a \$10,000 bond.

This committee has previously examined claims that some transportation brokers have failed to pay for the services rendered by the carriers and that the ICC has been slow to act to prevent such practices.

Do you have any views on this matter and how we might proceed to act on this in the future?

We have had a whole series of horror stories, Mr. Philbin, about some unscrupulous transportation brokers who take the money and

leave and where the \$10,000 bond does not begin to reimburse those who have been adversely affected.

Do you have any thoughts on this?

Mr. PHILBIN. Yes, sir. We have had a similar experience at the Federal Maritime Commission with the same general categories of problems. Some are with freight forwarders and brokers and various other middlemen who put the shipper together with a carrier, and there have been instances of unscrupulous characters, fly-by-nighters, if you will, who have done exactly what you have described.

I was sure when my nomination first came up that I would find something similar under the ICC jurisdiction. And the first thing I wanted was to be briefed on what are the ICC enforcement procedures? What is the efficiency of ICC enforcement? Are the bonding requirements high enough and are we applying the right standards to people when we first allow them to be licensed?

I am very sensitive to this particular area because there have been egregious cases before the Federal Maritime Commission which fortunately we were able to indentify and stop.

Senator EXON. Well, I do hope you will look at that because I suspect that we are going to have more and more of that in the future, and so far I do not think we have been able to come up with a workable solution. I do not think we are blaming the ICC for inaction in that area, but I think here is an area where we had better be working together, including looking to see if legislation is necessary.

Mr. PHILBIN. It might very well be and if I believe it is, I will come back to talk to the Congress about it.

Senator EXON. Thank you.

I want to put a caveat in there for myself. All too often when things come up somebody says there ought to be a law. Well, you know, we are never going to be able to invent laws or regulations that are going to stop all of the thievery that goes on in the United States or abuses.

We have got that very well established now by billions of dollars in some of our financial institutions, but at least I think we should continue to look and maybe some legislation of some kind would be necessary in this area.

My final question, Mr. Philbin, has to do with ICC registration numbers. ICC regulated motor carriers are required to display an ICC number on the side of their truck cabs.

The ICC recently initiated a rule making to consider abolishing this requirement. Now, I have been advised that this has generated considerable concern from the shippers, the safety groups and from some of the carriers themselves for reasons ranging from safety enforcement to uniformity.

Do you have any thoughts regarding this particular subject and any reconsideration that you think should be weighed by the ICC?

Mr. PHILBIN. Senator, I hate to say this on your last question, but that matter is now up before the ICC for a proposed rule making. Public comments are coming in and if I make any statement at all, I would have to recuse myself from a decision on that matter.

Senator EXON. Thank you. That is understandable. I have no further questions.

There may be some additional questions that other Senators who could not make it here today might wish to ask and if those are submitted to you, we would appreciate your answering those as promptly as you possibly can.

In closing the hearing today, I want to tell you, Mr. Philbin, that I am very much impressed with your background and your qualifications.

I applaud the President for the quality of his nominee and this is one Senator who will certainly pledge to support it and do everything that I can to move this through in an expeditious fashion. Thank you very much, and we are adjourned.

[Whereupon, at 3:08 p.m., the committee adjourned, subject to the call of the Chair.]

[The following information was subsequently received for the record:]

POSTHEARING QUESTIONS OF SENATOR KASTEN AND THE ANSWERS

Question. There have been recent attempts in Congress and at the Commission by certain shippers groups to attempt to force down rail rates for commodities such as coal. Are you aware of the negative impact that such actions would have on the vast majority of shippers whose rates would have to be increased to match the reductions forced on coal rail rates? Do you agree that in the long term such mandated rate decreases would cause substantial harm to our rail transport system? As rates for so-called competitive shippers were increased these shippers would leave the system. This would further burden our highways with additional truck traffic, create substantial revenue losses for the railroads who would cut maintenance causing service to deteriorate and cause higher costs to those left on the system. What do you think about these concerns?

Answer. The premise of this question is that coal rail rates are currently covering costs, including a reasonable return to capital. If that is the case, then one could assume that forcing coal rail rates to levels which are not fully compensatory might cause the rail carrier to attempt to recover some of the lost revenues from other categories of traffic to ensure that it is able to continue to maintain its current capital structure and attract capital in the future.

The ability of the railroad to increase its rates and revenues earned from other shippers, however, depends upon the ability of these other shippers to find alternative transportation arrangements.

Thus, without complete knowledge of the current rail rate and cost structure in transporting commodities such as coal, any answer to the question would be speculative. The concerns you have expressed are very serious and I will give careful attention to them, if confirmed by the Senate.

Question. Maritime regulation and rail regulation differ greatly. One of the wide divergences is with regard to contract rates. Much of the success of contracting on the railroads seems to depend on the confidentiality of these contracts but under maritime regulation, contracts are published. Do you fully support the confidentiality of rail-shipper contracts?

Answer. One reason for the differing treatment of contracts in the maritime and rail sectors stems from the fact that the maritime industry is international in scope. The Shipping Act of 1984 requires that the essential terms of service contracts be made publicly available. This public disclosure requirement flows, in part, from the fact that the 1984 Act authorizes carrier conferences to exist and permits them to collectively set rates. The majority of the members of these conferences are foreign ship lines. Thus, the 1984 Act represents a compromise between granting antitrust immunity for collective rate making and requiring that the collective rates of service contracts that are agreed upon be made available for public inspection.

The rail sector, of course, operates essentially in a domestic setting without the broad antitrust immunity accorded shipping conferences. The design of the service contract system in the rail sector thus has developed somewhat differently. The confidentiality of service contracts in the rail sector would, therefore, seem more attuned to the regulatory system developed for the rail system.

Question. During the previous Chairman's tenure, policy and regulatory decisions were made to preserve and maximize the benefits of the Staggers Rail Act. What are your plans in this regard?

Answer. As I have expressed at length in my opening statement to the Committee, it is my view that the proper role for a regulatory agency is the unbiased and energetic execution of the laws written by the Congress. That philosophy represents my policy.

Question. The railroads and many shippers believe that ICC's interpretation and administration of the Staggers Act has been reasonable and proper. However, other groups of shippers feel that the ICC too narrowly defined the conditions under which the Commission should order a railroad to allow use of its facilities by a competitor. What is your view as to whether the ICC has properly interpreted the Staggers Act as to competitive access?

Answer. The issue of competitive access is complex since it includes considerations of many factors such as private property rights, the public interest and competitive market conditions. I believe that each decision in this area must be based on all of the facts developed in the particular case. While at this point I am not completely informed about all of the ICC's past actions regarding competitive access, it is an area which can have significant consequences for both carrier and shipper. My general approach would be to study the merits of each case filed under the competitive access rules to ensure that a balance is struck between the legitimate concerns of all contending parties. Each case will, no doubt, present differing views of shippers and carriers on the competitiveness of the rates charged by the railroad, the competitive circumstances the shipper faces, and viable transportation alternatives. My general approach would be to require use of mandatory access in instances where it is necessary to remedy or prevent anti-competitive behavior.

Question. Do you feel the Commission should reopen generic rulemaking proceedings on maximum rates or competitive access or in the alternative proceed on a case by case basis to refine the principles already established in these areas?

Answer. Given the complex nature of the maximum rate and competitive access cases, it would seem more productive to proceed on a case-by-case basis. As the Commission proceeds in each case and develops increased information and experience on the issues, it might be appropriate to consider a more generic approach to rulemaking at some later date.

Question. Present ICC policy appears to find that a proper maximum rate level for individual rail rates, where the railroad is market dominant, is either what an efficient theoretical competitor could charge or the level at which traffic having similar demand characteristics moves. What do you believe about the reasonableness of these guidelines?

Answer. The theory of rate regulation is derived from the notion that, in a particular market, the forces of competition are not sufficient to produce a normal market price. Maximum rate regulation is, therefore, based on the concept that the regulator must intervene in the market place so that the price established is an approximation of a competitive market-determined price.

Thus, the regulator is charged with replicating the market process to arrive at a fair and reasonable rate. Such a process must take into consideration market-based concepts such as what an efficient carrier would charge if subjected to competition in a market place with similar supply and demand characteristics as the one under investigation.

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